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NO. 87-848

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF MENTAL HEALTH AND THE DIRECTORS OF THE MAY AND AUSTIN UNITS AT BOSTON STATE HOSPITAL,

Petitioners,

v.

RUBIE ROGERS, HAROLD WARNER, ABLE BOLDEN, WILLIE WADSWORTH DONNA HUNT, AND JAMES COLLERAN,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Was it within the authority of the court of appeals to hold Massachusetts state officials in civil contempt where it was required to ensure payment of a district court judgment under 42 U.S.C. §1988, where the respondents were suffering irreparable financial harm from the delay in payment and where the court was not convinced that state officials had done all that could have been done to obtain timely legislative appropriation.

II. Was it within the authority of the Court of Appeals to hold state officials in civil contempt, where the petitioners position was that the federal court lacked power to ensure compliance with an attorneys fee award against the petitioners unless the state provided the means to enforce such judgment.

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STATEMENT OF THE CASE

Proceedings In the Lower Courts

On June 27, 1986 the United States District Court for the District of

Massachusetts entered a judgment against the petitioners awarding approximately 1.47 million dollars in attorneys fees and costs to the respondents pursuant to 42 U.S.C. §1988. Rogers v. Okin, 638 F.Supp. 934 (D. Mass. 1986).

On October 23, 1986, four months after judgment was entered, the petitioners filed a motion for a stay of the judgment in the district court, pursuant to Rule 62 of the Fed.R.Civ.P. (A.32-35). At the time of the filing of this motion, the petitioners had not made any effort to seek an appropriation from the legislature with which to pay the judgment. (A.49-50, 75-76, 109-111).

The respondents opposed the motion for a stay, arguing that because of the Commonwealth's assertion of sovereign immunity to post-judgment interest, the status quo would not be preserved pending resolution of all appeals on the

respondents' fee petition. Rather, respondents would suffer irreparable financial harm with each days' delay in payment of the fees and costs during the period of petitioner's appeal of respondents' fee claim. (A.68-84). (See also Note 5 at page 6 of petitioners' petition).

Prior to opposing the petitioners' motion for stay in the district court, the respondents communicated to the petitioners a willingness not to oppose a stay if the Commonwealth would agree to enter into a written agreement to pay the judgment plus statutory interest upon resolution of the appeal. The petitioners refused the offer and the respondents therefore notified the petitioners that they would seek to execute on the judgment, unless a stay was issued. (A.16,70).

The district court denied the Motion

for Stay on February 18, 1987. (A.20).

The petitioners filed a motion for a stay of judgment pending appeal in the court of appeals on March 31, 1987, almost one and a half months after the Motion for Stay was denied by the district court. (A.39-42). Again, the petitioners had not sought any appropriation from the legislature at the time it filed this stay motion (A.49-50, 75-76, 109-111).

The respondents again opposed this motion for a stay pending appeal and moved for an order directing payment. (A.68-84).

On April 7, 1987, the court of appeals heard argument on the petitioners' appeal from the district court judgment on fees and costs and on the motion for a stay. In the course of the argument, the court indicated that it would not use its discretionary power to grant a stay, because of the potential for irreparable financial harm to

the respondents, unless the petitioners agreed to waive its claim of sovereign immunity from post-judgment interest. (A.16-17, 85-86).

The petitioners notified the court of appeals that they would not waive their claim of sovereign immunity. On May 7, 1987, the court then denied the motion for a stay. (A.13-19, 85-86). The court also ordered that the full amount of the district court judgment of approximately 1.47 million dollars be paid in a form approved by the district court within forty-five (45) days; i.e., on or before June 15, 1987. (A.13-19). The court also stated that "[s]hould payment not be made on that date, defendants risk contempt and a substantial penalty for every day's delay beyond June 15, 1987." (A.18).

The order was based on the court's view that, due to the Commonwealth's refusal to

waive its immunity from post-judgment interest, the respondents would suffer an irreparable loss of money, rightfully theirs, by any delay in payment. (A.15-16). Secondly, the court held that granting the stay would violate the public interest since it "could well have a chilling effect on other potential civil rights attorneys". (A.16).

On June 12, 1987, the court of appeals vacated the district court's judgment, and reduced the district court's award of attorneys fees and costs to about eight-hundred seventy thousand ($870,000) dollars. Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987). Virtually the sole basis of the court of appeals' reduction of the fee award was it's reliance on this Court's reasoning in Library of Congress v. Shaw, ____ U.S. ____, 106 S.Ct. 2957 (1986). The court of appeals held that petitioners were immune

from an award of prejudgment interest under 42 U.S.C. §1988 and that, therefore, the district court's use of current hourly rates rather than historic rates was in error since it was equivalent to awarding prejudgment interest. Rogers v. Okin, supra, 821 F.2d at 26-28.

The respondents filed a motion for reconsideration, claiming mathematical error in the computation of the fee awarded pursuant to the court's June 12, 1987 decision and order. On July 2, 1987, the court of appeals, acting upon this motion for reconsideration, increased the judgment by some one-hundred five thousand ($105,000) dollars, to a total of about nine-hundred seventy-five thousand ($975,000) dollars.

By June 15, 1987, the money to pay the judgment had not been appropriated by the Massachusetts legislature.

It was not until May 29, 1987, eleven

months after the judgment was initially entered, that the Executive Branch first filed a supplemental budget relating to payment of the plaintiffs' fees and costs. (A.128-130).

Prior to June 15, 1987, the respondents had significant difficulties in obtaining information from the petitioners about whether and when payment would be made. It was only after numerous status calls to petitioners' counsel that the respondents were informed, on June 5, 1987, that the earliest the Commonwealth would be likely to honor the court of appeals order would be sometime after July 15, 1987. (A.88). Respondents were also informed that only if the legislature approved the appropriation of attorneys fees and costs would payment be made. (A.88-89). Respondents were never advised by the petitioners as to how long it would be from the date of appropriation

until the date of payment. (A.89). Nor did the petitioners offer to pay to respondents post-judgment interest during any additional period of delay in payment. (A.89).

As a result, on June 16, 1987, nearly a year after the award of attorney's fees and costs had been entered, the respondents filed with the court of appeals a motion for a court order holding the petitioners in civil contempt, and for an order for petitioners to pay a substantial penalty for every day's delay in payment beyond June 15, 1987. (A.90-91).

The petitioners opposed this motion, arguing that a finding of contempt was not warranted since they claimed they had acted promptly and diligently to obtain payment and that they lacked authority to pay the judgment absent such appropriation. (A.92-124). Only after the respondents filed their motion for civil contempt did

petitioners finally indicate any willingness to expedite payment after legislative appropriation. (A.103). Prior to the filing of this motion, the petitioners had never communicated to the respondents any intention or willingness to expedite payment after legislative appropriation. (A.131).

In response to the petitioners' opposition to the civil contempt motion, respondents stated that the petitioners had failed to present facts to demonstrate that they had acted with diligence. (A.128-132).

The court of appeals held that it was not convinced that the petitioners had met their burden of proving that all that could have been done was done to obtain timely legislative appropriation. (A.6-7).

Secondly, the court rejected petitioners' impossibility defense, since it viewed the named defendants and the Commonwealth as a single entity for purposes

of enforcement of a fee award judgment. (A.7-9). The court held that since the Commonwealth was not insolvent and the legislature could have appropriated the money by June 15, 1987, compliance was not impossible. (A.6-7). The court noted that "a year had passed since the district court first ordered payment". (A.8-9).

Notwithstanding the court's findings, it agreed not to hold the petitioners in civil contempt if the petitioners notified the court within two (2) weeks that it would pay the respondents interest at the federal statutory rate on the attorneys fees award running from June 15, 1987 to the date of payment. (A.10-12). The petitioners notified the court it would refuse to waive its immunity as to post-judgment interest. (A.136).

The Massachusetts legislature appropriated the money to pay the judgment

on July 16, 1987. Payment of the judgment was received on July 21, 1987. The contempt fine, totalling ten thousand five hundred dollars ($10,500), was paid on August 20, 1987.

REASONS FOR THIS COURT TO DENY CERTIORARI

I. The Decision Below Was Well Within The Proper Exercise Of The Lower Court's Judicial Authority.

A. The Lower Court had Sufficient Facts to Demonstrate that All Reasonable Steps to Obtain Payment Were Not Made.

In order to achieve compliance with its May 7, 1987 order, the court of appeals had no choice but to hold the petitioners in civil contempt. Although the court recognized that several Commonwealth officials had made good faith efforts to comply with the May 7th order, the court of appeals was confronted with facts which demonstrated that petitioners had failed to do "all that they could have done to obtain timely legislative appropriation." (A.6).

Where the respondents were suffering irreparable financial harm from the delay in payment and where the court was not convinced that state officials had done all

they could to obtain timely legislative appropriation, the court of appeals was within its authority to hold Massachusetts officials in civil contempt.

The court was aware that the petitioners had waited almost a full year from the date of the district court order, or from June 27, 1986 until May 29, 1987, before having a supplemental budget filed in the Massachusetts legislature. (A.98-99). The court was cognizant that the petitioners had apparently decided to ignore the judgment of the district court for this eleven month period.

Furthermore, the court of appeals was advised that the petitioners delayed until October 23, 1986, or almost four months after issuance of the judgment, before filing a motion for a stay in the district court. (A.32-34). The court was aware that the petitioners chose not to take any steps

to obtain a legislative appropriation during the pendency of their motion to stay in the district court or even after the district court denied their motion for a stay on February 18, 1987. (A.20, 49-50, 75-76, 109-111).

The court was also aware that the petitioners had failed to act even though the first supplemental budget of fiscal year 1987 was submitted by the Governor in March of 1987. (A.98-99). It was also brought to the attention of the court that even though failing to take any steps to obtain an appropriation in March of 1987, the petitioners had waited a month and a half after the district court's denial of the stay motion, until March 31, 1987, to file a motion for stay of judgment pending appeal in the court of appeals. (A.39-42).

The petitioners also were found not to have made "any serious effort" after the

court's May 7, 1987 order issued, "to urge the executive branch to submit to an expedited single item appropriation request to the legislature as opposed to merely requesting that the appropriation occur with the next regularly scheduled supplemental budget." (A.6).

As a result of all the facts presented by the petitioners, the court stated that it was not persuaded that the petitioners had "met their burden of proving that they and other executive officials have done all they could have done to obtain timely legislative appropriation." (A.6). The court stated "[t]he fact that some efforts to obtain such funds were made does not prove further efforts would have been fruitless." (A.6-7).

Because the petitioners failed to demonstrate they had acted diligently and had taken all reasonable steps in obtaining payment, the court of appeals acted entirely

appropriately in holding the petitioners in contempt.

II. The Court of Appeals Was Correct in Holding that Impossibility Was Not A Defense Under the Circumstances.

The petitioners argued to the court of appeals that the federal court lacked the power to ensure compliance with an attorneys fee award against the state unless state law provided a means to enforce such a judgment. The petitioners maintained this position even though they knew that assertion of sovereign immunity would cause irreparable financial harm to the respondents. Petitioners were aware that each day's delay in payment would cause respondents to lose the use of their money or their ability to obtain interest on the money that was rightfully theirs as a result of the district court's judgment.

The court of appeals was confronted

with a situation that directly implicated the ability of the judicial branch to enforce fee awards under the civil rights statute, 42 U.S.C. §1988.

The court was faced with a party which had no incentive to provide resolution of payment through legislative appropriation, since no interest was due on the outstanding judgment. The state was arguing in effect, "you may order a fee to be paid, but you can't make us pay in any reasonably timely fashion." The court determined that only through an order of contempt would enforcement of the fees judgment occur.

This court declared in Hutto v. Finney, 437 U.S. 678, 696 (1978) that any reasonable action may be taken by a court to secure compliance with its orders. "[A] federal court may treat a State like any other litigant when it assesses costs."

The court of appeals was merely

implementing a congressional mandate as to an award of attorneys fees. Here, the court of appeals acted well within its authority to ensure compliance with its lawful rules. "[F]ederal courts are not reduced to issuing [judgments] against state officers and hoping for compliance." Hutto, supra, 437 U.S. at 690. Such a result would be contrary to the command of the Supremacy Clause of the United States Constitution. Federal courts have the power to impose financial penalties against states which refuse to comply with federal court orders. Hutto v. Finney, supra, 437 U.S. at 690-691.

The petitioners argue in their petition to this Court that if a state legislature does not appropriate payment of attorney fees after efforts are made by executive branch officials, the federal courts have no power to enforce the fee orders. Under this reasoning, as long as executive branch

officials make efforts at obtaining an appropriation, the state could avoid payment of fees altogether or delay payments for prolonged periods, while having no obligation to pay post-judgment interest.

As the court of appeals stated, for purposes of liability for an award of attorney fees and costs under 42 U.S.C. §1988, the state is the real party. (A.7). See Kentucky v. Graham, 473 U.S. 159 (1985); Hutto v. Finney, supra, 437 U.S. at 693-700.

It would be anomolous to consider the state the real party for purposes of enforcement of fee awards, but at the same time to allow the executive branch of the state to argue that it is impossible to act because of the failure of the legislative branch of that state to appropriate the funds.

As the court of appeals stated:

> Recognition of the impossibility defense advanced by defendants would

> render enforcement of section 1988 award against state officials impossible, since it is inevitably the case that the state legislatures and not the named officials control the state purse strings.

(A.8).

In the lower court, the petitioners had not asserted that the state was insolvent or that it would have been impossible for the state legislature to have appropriated the money over the almost one year period after judgment had entered in the district court. Thus the court of appeals properly rejected the petitioners impossibility defense. (A.8-9).

Courts confronted with similar questions relating to the federal courts' authority to enforce fee judgments under 42 U.S.C. §1988 have applied an analysis similar to the analysis applied by the court of appeals in this case. See Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980); Gary

W. v. State of Louisiana, 622 F.2d 804 (5th Cir. 1980); Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); Assoc. for Retarded Citizen of N.D. v. Olsen, 561 F.Supp. 495 (D. N.D. 1982); La Raza Unida v. Volpe, 545 F.Supp. 36 (D. N.D. Cal. 1982).

Since under the circumstances presented in this case, the court of appeals was acting well within its judicial authority, there is no grounds for this Court to grant certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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